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In the Supreme Court of the United States

OCTOBER TERM, 1995

KENNETH W. MCGILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Convicted felons are not allowed to own or possess guns. The Bureau of Alcohol, Tobacco & Firearms (ATF) is statutorily authorized to grant applications for relief from that prohibition. Since 1992, however, every Department of the Treasury appropriations statute has specified that ATF may not expend any appropriated funds to act upon such applications. The question presented is whether federal district courts have authority to consider the merits of such applications in the first instance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bagdonas v. *ATF*, 884 F. Supp. 1194 (N.D. Ill. 1995)	10
Bradley v. *Bureau of Alcohol, Tobacco and Firearms*, 736 F.2d 1238 (8th Cir. 1984)	7
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	9
Moyer v. *ATF*, 830 F. Supp. 516 (W.D. Mo. 1993)	7, 11
Owen v. Magaw, No. 96-4039-RDR (D. Kan. July 29, 1996)	11
Rice v. *United States Dep't of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995)	5, 8, 10, 11
United States v. *Dickerson*, 310 U.S. 554 (1940)	5
United States v. *Mitchell*, 109 U.S. 146 (1883)	5
United States v. *Will*, 449 U.S. 200 (1980)	5
Young v. *ATF*, 690 F. Supp. 990 (S.D. Ala. 1988)	9

Statutes and regulation:

Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732	3, 6
Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228	3, 6
Treasury Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385	3, 6

Statutes and regulation—Continued: Page

Treasury Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471 ..... 3, 6
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 706(1) 8
5 U.S.C. 706(2)(A) 9
18 U.S.C. 921(a)(18) 3
18 U.S.C. 922(g)(1) 2
18 U.S.C. 925(c) ..... *passim*
27 C.F.R. 178.144 3

Miscellaneous:

H.R. Rep. No. 183, 104th Cong., 1st Sess. (1995) 4, 6
S. Rep. No. 106, 103d Cong., 1st Sess. (1993) 4, 6
S. Rep. No. 353, 102d Cong., 2d Sess. (1992) 4, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 74 F.3d 64. The order of the district court (Pet. App. 10a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1996. The petition for a writ of certiorari was filed on April 15, 1996, and placed on this Court's docket on June 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under federal law, persons convicted of crimes punishable by a term of imprisonment in excess of one year are prohibited from owning or possessing firearms. 18 U.S.C. 922(g)(1).[1] The Director of ATF is authorized to lift that prohibition if, after an investigation, "it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c).[2]

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[1] Section 922(g)(1) provides:

> (g) It shall be unlawful for any person —
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[2] Section 925(c) provides:

> A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant

In each of the annual ATF appropriations bills passed since 1992, however, Congress has expressly forbidden ATF from using any appropriated funds to investigate or act upon applications for relief under Section 925(c):

> [N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c).

Treasury, Postal Service, And General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 471 (1995); Treasury, Postal Service, And General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2385 (1994); Treasury, Postal Service, And General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1228 (1993); Treasury, Postal Service, And General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732 (1992). Congress imposed that ban because it concluded that an ATF determination to grant relief "could have devastating consequences for innocent citizens if the wrong decision is made," and that

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> will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Secretary may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.

This statute refers to the Secretary of the Treasury. 18 U.S.C. 921(a)(18). The Secretary's functions under this provision have been delegated to the Director of ATF. 27 C.F.R. 178.144.

ATF's scarce resources "would be better utilized" on more pressing matters, such as fighting crime. S. Rep. No. 106, 103d Cong., 1st Sess. 20 (1993); S. Rep. No. 353, 102d Cong., 2d Sess. 19-20 (1992). The House Report accompanying the current prohibition reiterated that "[t]here is no reason to spend the Government's time or taxpayers' money to restore a convicted felon's right to own a firearm." H.R. Rep. No. 183, 104th Cong., 1st Sess. 15 (1995).

2. Petitioner is a convicted felon. In 1995, he filed with ATF an application for relief from his federal firearms disabilities under 18 U.S.C. 925(c). ATF responded that no action would be taken on his application in light of Congress's explicit restriction on the use of appropriated funds. Pet. App. 2a.

Petitioner subsequently filed suit in federal district court. Petitioner did not dispute that ATF was prohibited by law from acting upon his application for relief. Rather, petitioner asked the district court to conduct its own inquiry into his fitness to possess a gun, and to issue a judicial order restoring his firearms privileges. Pet. App. 12a-18a. Rejecting petitioner's request, the district court issued a brief order stating that it was without authority to consider in the first instance the merits of petitioner's application. *Id.* at 10a-11a.

3. The court of appeals affirmed. Pet. App. 1a-9a. Relying on the text and legislative history of the pertinent funding provisions, the court concluded that, by prohibiting ATF from using appropriated funds to investigate or act upon applications for relief under 18 U.S.C. 925(c), Congress intended to suspend the operation of the statute.

> By withdrawing funds to the ATF to process these applications under these circumstances and with this explanation by the appropriations committee, it is clear to us that Congress intended to suspend the relief provided by Sec. 925(c). We cannot conceive that Congress intended to transfer the burden and responsibility of investigating the applicant's fitness to possess firearms from the ATF to the federal courts, which do not have the manpower or expertise to investigate or evaluate these applications.

Pet. App. 7a. Acknowledging that its decision was in conflict with *Rice* v. *United States Dep't of Alcohol, Tobacco and Firearms*, 68 F.3d 702 (3d Cir. 1995), the court stated that "[w]e disagree with the contrary conclusion of the Third Circuit." *Ibid.*

ARGUMENT

The court of appeals' decision is correct. Although the court's decision is in conflict with a decision of the Third Circuit, review by this Court is not warranted.

1. a. "[W]hen Congress desires to suspend or repeal a statute in force, there can be no doubt that * * * it may accomplish its purpose by an amendment to an appropriation bill." *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)). "The whole question depends upon the intention of Congress as expressed in the statutes." *Will*, 449 U.S. at 222 (quoting *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883).

As the court of appeals concluded, the text of ATF's last four appropriation bills and their accompanying legislative history show that Congress intended to suspend the operation of Section 925(c). In each of

those appropriation bills, Congress expressly provided that "none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c)." 109 Stat. 471; 108 Stat. 2385; 107 Stat. 1228; 106 Stat. 1732. The legislative history accompanying those bills explained the reasons for that prohibition: an ATF determination to grant relief "could have devastating consequences for innocent citizens if the wrong decision is made," and ATF's scarce resources "would be better utilized" on more pressing matters, such as fighting crime. S. Rep. No. 106, *supra*, at 20; S. Rep. No. 353, *supra*, at 19-20. The House Report to the current ban categorically states that "those who commit felonies should not be allowed to have their right to own a firearm restored. * * * There is no reason to spend the Government's time or taxpayers' money to restore a convicted felon's right to own a firearm." H.R. Rep. No. 183, *supra*, at 15. Thus, while Section 925(c) has not been repealed, Congress has effectively suspended its operation.

b. Relying on the Third Circuit's analysis in *Rice*, petitioner contends (Pet. 7-8) that, while Congress has disabled ATF from acting upon applications for relief, the district courts are under no such disability. That contention is unpersuasive.

Section 925(c) provides that relief from firearms disabilities may be granted if "it is established to [ATF's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). Section 925(c) therefore gives ATF broad discretion to decide

whether to grant an application. That discretion is subject to judicial review. *Ibid.* But the precondition for such review is the *denial* of an application. The judicial review provision expressly states that "[a]ny person whose application for relief from disabilities is *denied* by [ATF] may file a petition with the United States district court for the district in which he resides for a judicial review of such *denial*." *Ibid.* (emphasis added).

ATF has not "denied" petitioner's application within the meaning of Section 925(c). Under its appropriation bill, ATF is statutorily forbidden from taking any action at all on Section 925(c) applications: it may neither grant nor deny them. *Moyer* v. *ATF*, 830 F. Supp. 516, 518 (W.D. Mo. 1993). Because ATF did not deny petitioner's application, but simply failed to process it, petitioner had no right to seek judicial review in the district court under Section 925(c). That provision, in context, authorizes review only of ATF's exercise of the discretion conferred on it.

Even if ATF's refusal to process petitioner's application were treated as a denial, it would not assist petitioner. The Administrative Procedure Act provides the standard for reviewing ATF denials of applications. To obtain relief, the person seeking review must show that ATF's denial is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). See *Bradley* v. *Bureau of Alcohol, Tobacco and Firearms*, 736 F.2d 1238, 1240 (8th Cir. 1984). Petitioner cannot make such a showing. Congress directed ATF not to investigate or act upon applications for relief under Section 925(c). ATF's compliance with that Congressional mandate is not "arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law."

Relying on the Third Circuit's decision in *Rice*, petitioner contends (Pet. 7-8) that the agency's indefinite delay in processing his application constitutes "unreasonable delay." *Rice*, 68 F.3d at 709; see also *id.* at 710 ("undue delay"). The Administrative Procedure Act authorizes an individual to obtain relief from a court when an agency engages in "unreasonabl[e] delay[ ]." 5 U.S.C. 706(1). Where, as here, Congress prohibits an agency from acting, however, the agency's compliance with that command cannot constitute "unreasonable delay" within the meaning of 5 U.S.C. 706(1). Petitioner's reliance on the concept of unreasonable delay is misplaced for another reason as well. The ordinary remedy for agency delay is an injunction ordering prompt agency action. See 5 U.S.C. 706(1) (court may "compel agency action unlawfully withheld or unreasonably delayed"). Here, requiring ATF to act upon petitioner's application would contravene Congress's express prohibition.

While framing his action as one seeking judicial review of an ATF denial, in reality petitioner has asked the district court to consider the merits of his application in the first instance. Section 925(c), however, does not authorize a district court to conduct such an inquiry. Section 925(c) provides that the Director of ATF may grant relief from a firearms disability "if it established to *his* satisfaction" that relief is warranted (18 U.S.C. 925(c) (emphasis added)). Congress has enacted no analogous provision authorizing district judges to grant relief if the need for relief is established to their satisfaction. As we have noted, Congress has entrusted district courts with a more limited role: judicial "review" of ATF

"denials." That circumscribed judicial review authority does not permit district courts to substitute their judgment for that of ATF, much less exercise that judgment in the first instance. *Bagdonas* v. *ATF*, 884 F. Supp. 1194, 1198 (N.D. Ill. 1995); *Young* v. *ATF*, 690 F. Supp. 990, 994 (S.D. Ala. 1988) (citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971)).

Contrary to the Third Circuit's view in *Rice* (68 F.3d at 709), a court's authority under Section 925(c) "to admit additional evidence where failure to do so would result in a miscarriage of justice" does not suggest that courts have authority to determine in the first instance whether relief under the statute is warranted. The authority to admit additional evidence is not freestanding; it may be exercised only in connection with a "review" of an ATF "denial" (18 U.S.C. 925(c)), in order to determine whether that denial is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)).

c. Petitioner's interpretation of Section 925(c) would also create inordinate practical difficulties, reinforcing the conclusion that Congress could not have intended to leave open the possibility that a person could seek relief from firearms disabilities from the district court in the first instance. By statute, relief from firearms disabilities may be granted only if "the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety." 18 U.S.C. 925(c). In order to determine whether an applicant satisfies those criteria, the ATF conducts an extensive field investigation that includes interviews of the applicant himself as well as his character references,

employers, neighbors, and probation officer. See, *e.g.*, *Rice*, 68 F.3d at 705; *Bagdonas*, 884 F. Supp. at 1199 (describing detailed background check). Federal district courts are ill equipped to conduct such investigations themselves.

The Third Circuit in *Rice* suggested that "the relevant provisions of the appropriation acts do not seem to preclude the agency from presenting its views on the propriety of granting [the felon's] application on the record created in a judicial forum." *Rice*, 68 F.3d at 709. That suggestion does not obviate the practical difficulties discussed above. ATF's appropriation bill precludes ATF from investigating any applications for relief under 18 U.S.C. 925(c), and there is no exception from that prohibition that would permit the ATF to conduct such investigations in response to a suit filed in federal district court. Absent the ability to investigate the applicant and his circumstances, neither ATF nor the district court can reliably assess whether relief under Section 925(c) is warranted.

2. The conflict between the court's decision in this case and the Third Circuit's decision in *Rice* does not warrant this Court's review. Both the decision below and the ruling in *Rice* are recent, and no other court of appeals has yet addressed the question on which those courts have disagreed. The issue is currently pending in a number of cases across the country, including matters on appeal in the Sixth and Ninth Circuits. *Chick* v. *ATF*, No. 95-5981 (6th Cir.); *Burtch* v. *United States*, No. 96-35066 (9th Cir.). We anticipate that those circuits will agree with the court of appeals' decision in this case, and that a consensus in the courts of appeals will begin to

emerge. At that point, the Third Circuit may reconsider its decision in *Rice*.[3]

Moreover, the decision in *Rice* has not had significant consequences thus far. In particular, we are informed that no felon has yet obtained relief from a district court in that circuit, and that no applications for relief are currently pending before district courts there (other than the application in *Rice* itself). For those reasons, while it is possible that the issue presented by petitioner may call for this Court's review at some later date, review at this time would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] The Third Circuit currently stands alone. Every district court that has addressed the issue, including both the district court in this case (Pet. App. 10a-11a), and the district court in *Rice* (see 68 F.3d at 704), has reached the same conclusion as the court of appeals here. See, *e.g.*, *Owen* v. *Magaw*, No. 96-4039-RDR (D. Kan. July 29, 1996), slip op. 5; *Moyer*, 830 F. Supp. at 518.